SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF HARTFORD

S.C. 17413

STATE OF CONNECTICUT

v.

EDUARDO SANTIAGO

BRIEF AMICUS CURIAE FOR
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF CONNECTICUT

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QUESTION PRESENTED

Can the Connecticut General Assembly constitutionally choose to repeal the death penalty on a prospective basis while retaining that punishment for crimes committed before the date of the repealing act?

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit corporation formed to represent the rights of victims of crime in the criminal justice system. The defendant's claim that a statute reducing the maximum penalty for a crime must apply retroactively, despite the unambiguous text of the act and clear intent of the legislature, is contrary to the rights CJLF was formed to protect.

NATURE OF PROCEEDINGS AND FACTS

Amicus CJLF adopts the statement in the State's Supplemental Brief.

ARGUMENT

I. The unfairness to the victims of retroactive application is a compelling and legitimate reason for the legislature to distinguish past and future cases.

Defendant contends that there is no rational basis for distinguishing between the worst murders committed before the date of the repeal act and comparably heinous crimes committed afterward. A compelling reason is immediately apparent.

A retroactive decrease in the punishment for a crime is fundamentally unfair to the victims, in much the same way that a retroactive increase is unfair to defendants and forbidden by the Ex Post Facto Clause. In the past few decades, American law has come to recognize that victims of crime, including surviving family members of homicide victims, have an interest in criminal proceedings against the perpetrator. In early America, victims were central to the case and even took the role of prosecutor. *See* S. Bibas, The

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party contributed to the cost of the preparation or submission of this brief. No person other than amicus curiae CJLF made a monetary contribution to its preparation or submission.

Machinery of Criminal Justice 3-4 (2012). Over the course of the nineteenth century and the early twentieth, victims were pushed aside to the point that they were little more than witnesses or bystanders. *See id*. at 16-17.

Renewed recognition that victims are much more than bystanders in the process can be seen in the victims' rights legislation enacted by state legislatures, by direct votes of the people of many states, and by Congress. *See*, *e.g.*, Conn. Const. art. I, § 8(b); Cal. Const. art. I, § 28; 18 U.S.C. § 3771. *See* generally Beloof, The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review, 2005 BYU L. Rev. 255, 262-274 (2005).

For the very worst murders, life imprisonment is watered-down, inadequate justice in the eyes of an overwhelming majority of the people of America and of Connecticut. *See infra* Part II. It is one thing to tell a victim's family from the very beginning that inadequate justice is all society can offer. It is quite another thing for the family to endure the trial and see the just sentence handed down, then possibly endure one or more appeals, and only then be told that the killer will permanently escape the full measure of justice.

The interest of victims in seeing justice done is a substantial one, even if intangible. Patricia Pendergrass, the sister of a murder victim, explains it in her essay, A Victim's Perspective: Justice for Bryon, J. Inst. Adv. Crim. Just. 79 (Summer 2008), http://iacj.org/PDF/IACJJournalIssues2.pdf. Bryon Schletewitz had been a witness in the murder trial of Clarence Ray Allen. From within prison, while sentenced to life imprisonment, Allen arranged for the murder of the witnesses to his first murder. *See id*. at 81. After seemingly endless legal proceedings, *see id*. at 83, the day of justice finally arrived.

> "The courtroom is like a lab and they dissect everything and sometimes the person gets lost. The defendant's rights are always paramount during the entire process even up until the moment of execution. When we left the death chamber, the prison personnel offered us their condolences and gently took my hand and it was like,

> finally, finally my brother mattered. That meant so much to me. That is not to say the execution brought closure in any way. The pain still remains, but that night while holding the tiny 'angel of peace' in my hand, I had hope to someday experience at least a glimmer of peace. With Allen gone, I definitely felt a weight had been lifted from my shoulders. He can never destroy anyone else. That was the weight that was lifted, the weight of the fear that even if he had been crippled or blind, as long as Allen could *communicate*, he was dangerous . . . .
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> "Losing my brother—losing Bryon—created a hole in my life that has never been filled. . . . I used to pray for justice for Bryon. When the state followed through with the sentence handed down to my brother's murderer, I finally felt that Bryon's life was recognized. Although it took many years to accomplish, in the case of Clarence Ray Allen, justice did prevail." *Id*. at 86.

For a variety of complex reasons, the Connecticut General Assembly has decided that this justice will not be afforded to victims' families in future cases of murder with special circumstances. It does not follow, though, that justice must be denied to those who have already been through a trial and received at least a contingent promise that justice will be done.[2]

Legislatures, and sometimes courts, frequently draw lines separating those who may be subject to a punishment from those who may not. Such line-drawing is a necessary part of legislation. The particular circumstances that constituted capital felony in Connecticut before repeal were not the same as those chosen by other states, but those lines have always been for the state legislature to draw. *See Jurek v. Texas*, 428 U.S. 262, 270-271 (1976) (variation among state eligibility criteria). A person could receive the death penalty for a capital felony committed on his 18th birthday but not for one committed the day

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2. Although it is theoretically possible for a new death sentence to be rendered for a crime committed before the repeal date but tried for the first time afterward, there is no such case to date, and Connecticut's very restrictive requirements for a death sentence make it unlikely there will be one. *See* David Owens, *Jusino Spared Death Penalty*, The Hartford Courant, Dec. 21, 2012 (capital felony, aggravating factor not proven).

before. *See* Conn. Gen. Stat. § 53a–46a(h) (prior to Public Act 12-5); *Roper v. Simmons*, 543 U.S. 551 (2005). A law is not unconstitutionally "arbitrary" because it draws these kinds of lines. Hence, only a rational basis is needed to sustain them. *See Chapman v. United States*, 500 U.S. 453, 464-465 (1991).

The distinction between yanking full justice away from victims of past crimes and not offering it for future crimes is a distinction that quite easily passes the rational basis test. Indeed, it would pass a higher degree of scrutiny if one were required. Refraining from betrayal of people who have already suffered far too much is a compelling state interest.

II. Repeal does not represent a consensus that death is an inappropriate punishment.

Defendant contends that the repeal act "represents the considered judgment of our Legislature and Governor that the death penalty is no longer consistent with standards of decency in Connecticut and does not serve any valid penological objective." Def. Supp. Brief 1. Defendant cites no authority for the remarkable proposition that the legislators who voted for repeal uniformly endorsed this particular reason out of the many that had been argued in favor of repeal. The year before, the Chief Public Defender urged legislators who did not accept this proposition to nonetheless vote for repeal for an entirely different reason.

> "While lawmakers and residents of the State may differ in good conscience regarding whether or not the State should have the Death Penalty, other states are abandoning it for various reasons, including the enormous financial drain on their economy. During times of economic crisis, difficult policy choices must be made that make economic sense as well as effectively protect public safety.
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> "The Budget implications are extraordinary. The Division of Public Defender Services incurred expenditures of $3.4 million in the last FY attributable to capital case defense representation at trial, ABS and appeals. This was a 39% increase over the prior fiscal year, and 7.2% of the Public Defender Services Commission's

total appropriation." Testimony of Susan O. Storey, Chief Public Defender, Judiciary Committee Public Hearing (Mar. 7, 2011).

There is a very good reason why the Chief Public Defender advanced budgetary considerations and not "standards of decency" as her primary argument for repeal. Opponents of the death penalty have been trying for decades to convince the people that the death penalty is wrong as a matter of principle, and the people have overwhelmingly rejected this argument in Connecticut and nationwide.

The standard poll question that Gallup and many other pollsters have been asking since 1936 is, "Are you in favor of the death penalty for a person convicted of murder?" *See* Lydia Saad, U.S. Death Penalty Support Stable at 63% (Gallup, Jan. 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx. The question is flawed because it asks about all murder, not the narrowed subset of murder eligible for the death penalty under modern statutes, and it could be read to ask whether the respondent favors the death penalty for all persons convicted of murder without regard to circumstances. Thus, the question understates the actual support for the death penalty. However, it is useful for comparisons across time periods and across jurisdictions because it has been asked for so long and so widely.

A Quinnipiac Poll in Connecticut in March 2011 showed that Connecticut voters were in favor of the death penalty by 67-28 on the standard question, a little above the national average. *See* Quinnipiac University Polling Institute, Press Release, *Death Penalty Support At New High In Connecticut*, Question 41 (Mar. 10, 2011), http://www.quinnipiac.edu/institutes-centers/polling-institute/connecticut/release-detail/?ReleaseID=1566. However, Quinnipiac also asked another question, rarely asked by pollsters, that more closely tracks the actual question: "Which statement comes closest to

your point of view? (A) All persons convicted of murder should get the death penalty. (B) No one convicted of murder should get the death penalty. (C) Whether or not someone convicted of murder gets the death penalty should depend on the circumstances of the case." *Id*. Question 43. Only 16% said no one. An overwhelming 73% chose "depend[s] on the circumstances," the actual law in every state with the death penalty since *Woodson v. North Carolina*, 428 U.S. 280 (1976). An additional 10% chose the mandatory option precluded by *Woodson*, so that a total of 83% agree that the death penalty is the appropriate and just sentence in the worst cases.

To believe that the Connecticut General Assembly as a whole repealed the death penalty on a "standards of decency" basis, one would have to believe that Connecticut's representative democracy is so far out of touch with the values of the people that it rejected as "indecent" a punishment believed to be just and right by over 8 out of 10 of the state's citizens. That proposition strains credulity.

Defendant contends, "In passing the Act, the State of Connecticut has made a commitment to the principle that death is not an appropriate retributive punishment even for the more heinous of crimes." Def. Supp. Brief 19. Further, he says it would be illogical to continue the punishment in force for prior crimes after making such a determination. *See id*. The second step in this argument is correct. Yet the General Assembly unquestionably did continue the punishment in force for those cases. That leaves two possible conclusions. Either the legislature of this state committed an irrational act, or the premise that the act was based on a rejection of death as an appropriate retributive punishment is false. A decent respect for a coordinate branch of government requires that a rational basis be presumed if one is available.

No doubt the principal sponsors of the repeal shared the view that the death penalty is inappropriate in all cases. Why, then, did they agree to make the repeal prospective only? Applying Occam's razor, the simplest explanation consistent with the facts is the preferred one. The sponsors simply knew that the "swing votes" did not share their view on the moral question. They could, however, be swayed by practical arguments such as the Chief Public Defender's cost argument.

The cost argument is far more compelling for future cases than for prior ones. The cost of the trial, at least for the guilt phase, has already been paid for the present case, and a retrial of penalty will cost less than an initial trial as the preparation has largely been done. Costs are further reduced for the cases that have completed direct appeal and are on collateral review.

The prospectivity clause, by itself, is compelling evidence that the margin of majority consisted of legislators who believe that death is the appropriate punishment for the worst murders but were swayed by other arguments, such as that the state simply cannot afford the price tag. The premise of defendant's argument is false, and the entire argument collapses without it.

III. Whether long-ago repeals of the death penalty, or recent narrowings of it, were applied retroactively is simply irrelevant to the statute in this case.

A brief has been filed by a group of amici curiae calling themselves "Legal Historians & Scholars." This brief makes the point that no state has, *to date*, executed a death sentence following a repeal of the death penalty or a narrowing of the eligibility criteria that would exempt similar cases in the future. *See* Brief of Amici Curiae Legal Historians & Scholars 1. From this, the amici attempt to construct "standards of decency" to authorize

this court to override the unambiguous determination of the legislature. *See id*. at 10.

The first aspect to note about the repeals cited is that most of them are quite old, predating *Furman v. Georgia*, 408 U.S. 238 (1972). The death penalty debate has changed in character over the years. Before *Furman*, and for many years afterward, the debate was primarily a moral one, with opposition based on an argument that the punishment was morally wrong in all cases. Justice Marshall traced the history in his concurring opinion in *Furman*, at 335-342. A common antebellum argument "pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived, not from fear, but from harmony with nature." *Id*. at 338 (footnote omitted).

Today, the debate is different. A contemporary example is the argument submitted to the voters of California for the 2012 general election. *See* California Secretary of State, California General Election Official Voter Information Guide 40-41 (2012), available online at http://voterguide.sos.ca.gov/pdf/. The arguments submitted by the proponents of repeal are completely devoid of any assertion that death is an unjust or "indecent" punishment for a person guilty of the highest degree of murder. The arguments consist entirely of risk of executing an innocent person, the high cost of the present system (including claimed better uses for the funds), and the fact that few executions have been carried out to date. The testimony of the Chief State Public Defender in Connecticut, discussed *supra* Part II, was similar.

As discussed in Part II, *supra*, the retroactivity question for a complete repeal of the death penalty is very different for a repeal based on a moral judgment versus one based on futility and expense. Mixing the two kinds of repeals in search of any kind of consensus

is an exercise in sophistry. There was no consensus in the Connecticut General Assembly that death is an inappropriate punishment for the worst murders, and the strong consensus among the people of Connecticut was just the opposite.

"Partial repeals," statutes excluding from the death penalty categories of persons rarely sentenced to death, are also an inappropriate place to look for guidance regarding the present statute. A legislature excludes juveniles or persons with retardation from the death penalty because it does not think they should be executed, not because those few cases cost too much, take too long, or are too seldom carried out.

The death penalty repeal that most closely resembles Connecticut's is the repeal in New Mexico. As defendant concedes, the ruling of the New Mexico Supreme Court was that the prospective-only feature of the law would be honored, and a post-repeal trial could proceed. Def. Supp. Brief 8-9, n. 17. The fact that this particular case ended with a life sentence is irrelevant. The fact that New Mexico has not carried out either of its remaining death sentences yet is also irrelevant. Those cases continue to be reviewed as if there had been no repeal. *See Allen v. Lemaster*, 267 P.3d 806 (N.M. 2011) (state habeas petition in capital case).

Amici supporting defendant attempt to construct consensus out of mere wisps. The repeals of and exclusions from the death penalty are motivated by various reasons, some supporting retroactive application and some not. The resolution of such competing concerns lies squarely within province of the legislature. There is far too little here to warrant a judicial override of the legislature's clearly expressed intent. The statute should stand as written.

IV. Compromise should not be unconstitutional.

Finally, amicus respectfully suggests that the Court consider the effect of its ruling on the legislature's ability to reach compromises in the future. Legislation is a messy business, often compared to making sausage. People with different beliefs and motivations must come together and find language a majority can agree on. A court ruling that the middle ground is forbidden would set a bad precedent in an era where there is too much partisanship and too little compromise already. The democratic process will work better if the legislature can have confidence that a bill it enacts will not have an effect that it clearly expresses it did not intend.

CONCLUSION

The retrial of the penalty in this case should proceed according to this Court's prior opinion.

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Respectfully submitted,

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CERTIFICATION

I certify that this document complies with the provisions of Practice Book §§ 62-7 and 67-2 and that on February 11, 2013, a copy of the foregoing was sent by U.S. mail postage prepaid to:

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